NO. 21935

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ASCENCION VASQUEZ-LOPEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED
JUL 2 6 1963
WM. B. LUCK, CLERK

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney

ROBERT L. BROSIO
Assistant United States Attorney,
Chief, Criminal Division

MICHAEL D. NASATIR
Assistant United States Attorney

1200 U. S. Courthouse
312 N. Spring Street
Los Angeles, California 90012
688-2417

Attorneys for Appellee,
United States of America

NO. 21935

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ASCENCION VASQUEZ-LOPEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney

ROBERT L. BROSIO
Assistant United States Attorney,
Chief, Criminal Division

MICHAEL D. NASATIR
Assistant United States Attorney

1200 U. S. Courthouse
312 N. Spring Street
Los Angeles, California 90012
688-2417

Attorneys for Appellee,
United States of America

TOPICAL INDEX

TABLE OF AUTHORITIES

Cases

NO. 21935

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ASCENCION VASQUEZ-LOPEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

On February 8, 1967, the Federal Grand Jury for the Central District of California returned an indictment in one count charging Appellant Ascencion Vasquez-Lopez with a violation of Title 21, United States Code, Section 176(a) [R.T. 2].[1/] The indictment charged that on or about January 30, 1967, in Los Angeles County, within the Central District of California, the defendant, with intent to defraud the United States, knowingly received, concealed and facilitated the transportation and concealment of 36,751.900 grams of marihuana, which said

---

1/ "R.T." refers to Reporter's Transcript of Proceedings.

marihuana, as the defendant then and there well knew, theretofore had been imported and brought into the United States contrary to law.

On February 13, 1967, Appellant was arraigned and pleaded not guilty [R. T. 3]. A jury trial was commenced on April 18, 1967, before the Honorable A. Andrew Hauk, United States District Judge.

On April 20, 1967, a verdict of guilty was returned by the jury; on May 15, 1967, judgment of conviction was entered. Appellant was sentenced to the custody of the Attorney General under the Federal Youth Corrections Act [R. T. 72].

On May 16, 1967, Appellant filed a timely notice of appeal. On June 13, 1967, Appellant filed a motion and affidavit of support to appeal in forma pauperis [R. T. 75]. On June 13, 1967, this motion was granted [R. T. 77].

Jurisdiction of the District Court was based on Title 18, United States Code, Section 3231. Jurisdiction of this Court is based on Title 28, United States Code, Section 1291.

STATEMENT OF FACTS

On a day prior to January 30, 1967, Federal Narcotic Agent Ortiz (while working undercover) made arrangements with a supplier in Tijuana, Mexico, to purchase 50 kilograms of marihuana. Delivery was set for January 30, 1967. On that date, at 9:30 A. M., Agent Ortiz was to go to a house located

at 6235 Bissell Street in Huntington Park; there he was to meet an individual who went by the name of Chon or Pecas. This man was to deliver the marihuana to him in exchange for $3,000.00 ($300.00 directly to the individual, and $2,700.00 in an envelope for the supplier in Tijuana) [R.T. 65].

On January 30, 1967, Agent Ortiz went to the house in Huntington Park and knocked on the door. It was opened by the defendant who then identified himself as Chon or Pecas and stated that he had been sent by Rafael. When asked if he had the merchandise, the defendant replied that he did and that it was in the car. Agent Ortiz said that he wanted to see it before paying and both men went to the car [R.T. 65]. When he reached the car, Agent Ortiz, still unable to see the merchandise, once more asked the defendant where the marihuana was and the defendant responded that it was in the door panels as evidenced by the fact that one could not roll down the back windows [R.T. 66]. Agent Ortiz then put his face close to the window of the car and detected the aroma of marihuana [R.T. 67].

On being asked where in the car the marihuana was placed the defendant responded that it was in the door panels of the rear doors and that he was sure because he had helped load the car on the previous day [R.T. 67].

Agent Ortiz asked the defendant if it was all in the door panels, to which the defendant responded that he didn't know, and that Ortiz would have to call Rafael in Tijuana to find out. Each man entered his own car to go to a phone booth on Bissell

Street [R. T. 67].

At the intersection of Bissell and Gage Streets, Agent Cortiz gave a prearranged signal to Agents Paulus and Lusardi. Both cars were forced to the curb and both drivers arrested [R. T. 68]. Agents Lusardi and Paulus immediately searched the defendant's vehicle. They found marihuana in the two rear door panels and in the two rear wheel wells of the interior [R. T. 78]. This substance was introduced into evidence as Government's Exhibit No. 1, 1-A and 1-B [R. T. 81].

Agent Paulus testified that shortly after noon on the day of the arrest he had a conversation with the defendant. He first asked the defendant whether he understood English; the defendant answered that he did not. Therefore, Agent Paulus, a graduate of the Justice Department Spanish Language School at Port Isabel, Texas [R. T. 137] warned him of his rights in Spanish [R. T. 138, 141]. Agent Paulus then asked the defendant whether he understood his rights; the defendant replied that he did [R. T. 141]. Agent Paulus, while in the process of filling out Immigration forms, questioned the defendant about his activities in crossing the border [R. T. 139].

Street [R. T. 67].

At the intersection of Bissell and Gage Streets, Agent Cortiz gave a prearranged signal to Agents Paulus and Lusardi. Both cars were forced to the curb and both drivers arrested [R. T. 68]. Agents Lusardi and Paulus immediately searched the defendant's vehicle. They found marihuana in the two rear door panels and in the two rear wheel wells of the interior [R. T. 78]. This substance was introduced into evidence as Government's Exhibit No. 1, 1-A and 1-B [R. T. 81].

Agent Paulus testified that shortly after noon on the day of the arrest he had a conversation with the defendant. He first asked the defendant whether he understood English; the defendant answered that he did not. Therefore, Agent Paulus, a graduate of the Justice Department Spanish Language School at Port Isabel, Texas [R. T. 137] warned him of his rights in Spanish [R. T. 138, 141]. Agent Paulus then asked the defendant whether he understood his rights; the defendant replied that he did [R. T. 141]. Agent Paulus, while in the process of filling out Immigration forms, questioned the defendant about his activities in crossing the border [R. T. 139].

ARGUMENT

I

THE TRIAL COURT PROPERLY EXERCISED ITS STATUTORY DISCRETION IN REFUSING TO ACCEPT APPELLANT'S REQUEST FOR A NON-JURY TRIAL.

In order for a defendant to waive his constitutional right to a jury trial, he must meet the requirements of Federal Rule of Criminal Procedure 23(a), Title 18, United States Code. To do so, not only must the defendant file a written request, but he must also secure the approval of both the Government and the Court.

In Patton v. United States, 281 U.S. 276, 312 (1930), the Court affirmed the policy of allowing the trial court to use its discretion in accepting or rejecting a defendant's request to waive his right to a jury trial when it stated:

> "In affirming the power of the defendant in any criminal case to waive a trial by a constitutional jury and submit to trial by a jury of less than twelve persons, or by the court, we do not mean to hold that the waiver must be put into effect at all events . . . . Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by

long experience, and are not now to be denied. Not only must the right of the accused to a trial by constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant." (Emphasis added.)

In charging the trial judge to use sound discretion, in ruling on the defendant's request, the Court further stated, "And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial . . . . " Id. 312.

In affirming the policy of both the Patton decision, and Rule 23(a), the courts have pointed out that Amendment VI of the Constitution creates only a right to a jury trial; no correlative right to a non-jury trial is created. The courts have also required the consent of both the Court and the Government before allowing the defendant to waive his right to a jury trial.

Singer v. United States, 380 U.S. 24 (1965)

C.I.T. Corporation v. United States,

150 F.2d 85 (9th Cir., 1945);

Mason v. United States, 250 F. 2d 704
(10th Cir., 1957);
Dixon v. United States, 292 F. 2d 768
(D.C. 1961);
United States v. Igoe, 331 F. 2d 766
(7th Cir. 1964).

It has not been argued, and no evidence has been introduced to show, that the defendant received an unfair sentence as a result of his having been tried and convicted by a jury. In fact, he was sentenced under the Youth Corrections Act, Title 18, United States Code, Section 5010(b), instead of under the normal sentencing provisions which requires a five-year mandatory minimum sentence. See Title 26, United States Code, Section 7237. Appellant has been subsequently discharged and deported to Mexico.

In discussing the absence of prejudice in cases where either the Court or the Government has refused to accept an accused's waiver of his right to jury trial the Court in Singer v. United States, 380 U.S. 24 (1965) pointed out that " . . . the result is simply that the defendant is subject to an impartial trial by jury -- the very thing that the Constitution guarantees him." (Page 36.)

Therefore, the trial court's refusal to accept Appellant's waiver of his right to a jury trial was not in error.

II

THE APPELLANT DID NOT, AT ANY TIME, ATTEMPT TO ENTER A PLEA OF GUILTY. EVEN IF HE HAD ENTERED SUCH A PLEA, THE TRIAL COURT COULD HAVE PROPERLY EXERCISED ITS STATUTORY DISCRETION IN REFUSING TO ACCEPT IT.

The record does not indicate any attempt, by the Appellant, to enter a plea of guilty. A discussion of the possibility that the defendant might have entered a plea of guilty was initiated by Mr. Lawrence [R. T. 14]. At that time, he stated that he had recommended a plea of guilty to a possible superseding Information charging a tax count, but that his client had indicated that he was not guilty and could not make such a plea. The Court then indicated to Mr. Lawrence that, in light of the defendant's belief, the proper procedure would be to go ahead and try the case. This dialogue is set forth below:

* * * * * *

"(The following proceedings took place in the chambers of the Court, with all parties present, including the defendant and an interpreter:)

"MR. LAWRENCE: I have recommended if there is any possibility of his being guilty that he change his plea, in view of the alternatives.

"THE COURT: You mean in connection with a possible superseding Information charging a tax count?

"MR. LAWRENCE: Yes.

"THE COURT: Have you explained to him the difference in penalties?

"MR. LAWRENCE: I have gone over that on numerous occasions.

"THE COURT: There are certain mandatory penalties in the so-called non-tax count cases.

"MR. LAWRENCE: Yes. I have spent, I would say, five hours with him in going over --

"THE COURT: What is his reaction?

"MR. LAWRENCE: He indicated that he is not guilty.

"THE COURT: Well, then, we go ahead and try it. That is all I think we can do.

"MR. NASATIR: Yes, sir.

"THE COURT: The Government thinks you have a good case?

"MR. NASATIR: Yes, your Honor.

"THE COURT: That is all we can do. If he thinks he is not guilty, I won't permit him to put in a guilty plea [R. T. 14-15]."

The Court questioned Mr. Lawrence at two other times about the possibility of a plea of guilty; both times it was assured by counsel that the defendant believed that he was not guilty, and was, therefore, unable to make such a plea. Both dialogues

are present below:

* * * * * * * *

"THE COURT: You are not considering this superseding Information? Have you explained to him the difference in penalties?

"MR. LAWRENCE: Yes, on numerous occasions and at great length. He advises me that he would have to invent a story in order to make a plea [R. T. 10].

* * * * * * * *

"THE COURT: I would like to get moving on it. What witnesses do you have?

"MR. LAWRENCE: Just the defendant.

"THE COURT: The defendant, himself. Where does he live?

"MR. LAWRENCE: Tijuana.

"THE COURT: He is not a National of this country?

"MR. NASATIR: No, your Honor, he is not.

"THE COURT: He still says he is not guilty?

"THE INTERPRETER: Yes, he is not guilty.

"THE COURT: All we can do is try it. Let's go out and pick a jury. I don't think it would be wise at all to accept any plea, in view of his statement that he is absolutely convinced he is not guilty. I don't want to indicate that he should do anything otherwise [R. T. 16]."

Rule 11, Federal Rules of Criminal Procedure, Title 18, United States Code (1966) not only grants the Court the discretion to refuse to accept a plea of guilty, but also requires that the Court, before accepting such a plea, first address the defendant to ascertain whether the presented plea is both voluntary and made with a full understanding of its meaning.

In Lynch v. Overholser, 369 U.S. 705, 719 (1962) the Court refused to accept the contention that a "criminal defendant has an absolute right to have his guilty plea accepted by the Court." It stated that "As provided in Rule 11, Federal Rules of Criminal Procedure, . . . the trial judge may refuse to accept such a plea and enter a plea of not guilty on behalf of the accused."

Therefore, in light of the strong doubt as to the defendant Vasquez-Lopez's desire for, and understanding of, an entry of a plea of guilty, had he attempted to enter such a plea the trial court could have acted properly in refusing to accept it.

III

APPELLANT'S STATEMENTS TO AGENT PAULUS WERE PROPERLY ADMITTED INTO EVIDENCE IN THAT THEY WERE MADE AFTER HE HAD RECEIVED AN ADEQUATE WARNING OF HIS RIGHTS, AND HAD SUBSEQUENTLY WAIVED THEM.

A. THE WARNING GIVEN BY AGENT PAULUS WAS PROPER IN THAT IT ADEQUATELY AND EFFECTIVELY INFORMED THE DEFENDANT OF HIS RIGHTS.

Agent Paulus testified that he made the following statement to Appellant before conversing with him:

> "A. ' . . . I advised him that under the laws of this country that he had rights; that he had a right to obtain an attorney either from the Government or with his own funds, his own money; that he did not have to talk or did not have to give me any statements; that if he did give me any statements that these statements could be used in Federal Court against him; that he could have an attorney with him at the time that he spoke. He answered that he did not have an attorney and had no funds to obtain an attorney. I told him that shortly he would be brought before the Judge and the Judge would obtain an attorney for him at that time.'" [R. T. 138].

Later Agent Paulus, a graduate of the Justice Department Spanish Language School at Port Isabel, Texas [R.T. 137], stated the warning as he remembered he had given it in Spanish. As related to the Court by the interpreter he said, "Under the law of this country you have rights. It is not necessary for you to speak anything. If you speak information to me, this information can be used against you in Federal Court. You can obtain an attorney from the Government of this country or with your money. When you speak it is necessary for you to speak slowly, correctly, completely -- and then, your Honor, he used an English word, 'voluntarily.' Mister, you understand your rights?"

"THE WITNESS: He answered that he understood his rights. That was the extent of that part. [R.T. 141].

The Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966) did not set out a specific warning which every law enforcement agency would be required to give, but rather chose to allow each agency freedom in formulating its own; the Court required only that " . . . the accused must be adequately and effectively apprised of his rights . . . . " (Id. 467). Although the Court chose not to dictate a specific form, it did summarize the requisite elements of a proper warning on page 444, where it said, "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."

In Coyote v. United States, 380 F. 2d 305 (10th Cir. 1967) cert. denied 389 U.S. 976, the policy of testing a warning by its substance rather than its form was followed. The Court stated:

> "Surely Miranda is not a ritual of words to be recited by rote according to didactic niceties. What Miranda does require is meaningful advise to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act. We will not indulge over the particular words used to inform an individual of his rights. The crucial test is whether the words in the context used, considering the age, background and intelligence of the individual being interrogated, impart a clear, understandable warning of all his rights." Id. 308.

See also, Green v. United States, 386 F. 2d 953 (10th Cir., 1967).

In Keegan v. United States, 385 F. 2d 260 (9th Cir., 1967) the Court found the substance of the following warning sufficient.

> "You don't have to say anything without the presence of an attorney. Anything that may be said out of the presence of an attorney could be held against you in a Court of law. If you don't have funds to pay for an attorney, we will appoint one." Id. 262.

In Coyote v. United States, supra, the defendant was informed that he had a right to remain silent, and that anything

he said could be used against him. He was also given a written statement which included a warning that " . . . I can talk to a lawyer or anyone before saying anything, and that the judge will get me a lawyer if I am broke." Id. 307. This warning was held to be adequate and effective.

Certainly, the warning, administered by Agent Paulus to the Appellant, conveyed the information required by the Miranda decision as adequately and effectively as the warnings cited above.

It has often been contended that a failure to expressly advise a defendant that he had an immediate right to obtain an attorney at the moment the warning was given constituted error. However, once more the courts have not required a specific pattern of words, but have chosen to determine whether the possible ambiguity in a warning could have been interpreted so as to give the defendant the understanding that he had an immediate right to counsel.

In Coyote, supra, the Court, through recognizing the possible ambiguity in the warning that " . . . the judge will get me a lawyer if I'm broke" at 307, held that it was sufficient to inform the defendant of his immediate right to counsel.

The defendant in Alexander v. United States, 380 F. 2d 33 (8th Cir., 1967), was given the following warning:

> ". . . . you have a right to have a lawyer of your own choosing if you have the money. If you don't an attorney will be furnished you gratis, free

by the County of Richardson, state of Nebraska. You need not make any statement, but if you do make any statement that statement will be used in court against you." Id. 35, note 1.

Although this warning did not include an express statement that appointed counsel could be provided the defendant immediately, the Court held that it was sufficient to inform him of his rights.

Therefore, the warnings given by Agent Paulus were substantively sufficient to adequately and effectively warn the appellant of his constitutional rights.

B. STATEMENTS MADE AFTER A SUFFICIENT WAIVER OF RIGHTS WERE PROPERLY ADMITTED INTO EVIDENCE.

The Miranda holding does not make all statements inadmissible at trial. The court was careful to point out that:

"In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely, voluntarily without any compelling influences is, of course, admissible in evidence." Id. 478.

The Miranda Court placed on the Government the burden of proving a sufficient waiver of the defendant's rights. The Government contends that it met this burden when it introduced testimony of Agent Paulus in which he stated that he had asked

the defendant the question, "Mister, you understand your rights?" to which the defendant reportedly responded ". . . that he understood his rights." [R.T. 141].

The record does not indicate that the appellant ever requested that an attorney be present during the interrogation; therefore, there is no evidence that Agent Paulus refused such a request or that the interrogation was in violation of the Miranda requirements. After being told of his right to counsel, appellant merely stated that " . . . he did not have an attorney and had no funds to obtain an attorney." [R.T. 138]. Once more Agent Paulus told him that one could be obtained at the expense of the Government, but the defendant did not request that this be done. Inasmuch as the defendant had not only indicated that he understood his rights, but also had failed to request the presence of an attorney (after having been told twice that one would be provided at the government's expense), Agent Paulus continued his questioning; the defendant freely and voluntarily answered these questions.

After having been fully advised of his rights and indicating that he understood them, the defendant chose to speak. As such, the record clearly demonstrates a knowing and intelligent waiver.

In United States v. Hayes, 385 F.2d 375 (4th Cir., 1967), the defendant was asked whether he understood the warning, or whether he wanted the assistance of counsel. The Court held that:

> " . . . we cannot accept appellant's suggestion that because he did not make a statement -- written or

oral -- that he fully understood and voluntarily waived his rights after admittedly receiving the appropriate warnings, his subsequent answers were automatically rendered inadmissible. Of course, the attendant facts must show clearly and convincingly that he did relinquish his constitutional rights knowingly, intelligently, and voluntarily, but a statement by the defendant to that effect is not an essential link in the chain of proof." Id. 377. (Emphasis added.)

In this case the Government has shown that the defendant was asked whether he understood his rights, and that he answered that he did. This certainly exceeds the requirements of the Hayes case.

In Coughlan v. United States, (9th Cir. No. 21,626, February 20, 1968) the Court held certain statements admissible even though the record failed to disclose an express statement that the defendant waived his rights.

Both the Hayes and Coughlan opinions are consistent with principles espoused in Miranda which requires an express waiver on record only ". . . . in the absence of a fully effective equivalent . . . " Miranda at 476.

This case does not present a situation replete with coercion, extended interrogation, or any of the other evils that prompted the Court to require that each defendant be warned of his con-

stitutional rights and be given an opportunity to secure an attorney. The appellant was afforded these safeguards. After indicating that he understood the alternatives presented him, he freely and voluntarily answered the questions directed to him by Agent Paulus. Therefore, since the Appellant's rights were fully protected, the answers to Agent Paulus' questions were properly received in evidence.

IV

ASSUMING ARGUENDO THAT APPELLANT'S STATEMENTS ARE INADMISSIBLE, THEIR INTRODUCTION INTO EVIDENCE CONSTITUTED HARMLESS ERROR.

As pointed out by the Court in Chapman v. California, 386 U.S. 18, 21 (1966), not "all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful."

The Chapman court went on to state that ". . . there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." Id. 22.

The Court set the standard for review in its holding that ". . . before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Id. 24.

A strict harmless error rule is necessary to prevent the introduction of "highly important and persuasive evidence, or argument, though legally forbidden" from finding its way "into a trial in which the question of guilt or innocence is a close one." Id. 22.

In this case the statements, made to Agent Paulus and related by him to the Court, do not fall within the category of "highly important and persuasive evidence." They were merely responses to questions asked by Agent Paulus in his attempt to gain information necessary to complete forms for the Immigration Department [R.T. 139].

The introduction of these statements was not prejudicial because the question of guilt or innocence was not "a close one" as required by the Chapman holding. Disregarding the entire testimony of Agent Paulus, the evidence presented by Agent Ortiz was more than sufficient to prove the defendant's guilt beyond a reasonable doubt.

The Court may properly determine whether the record striken of all prejudicial evidence, contains sufficient evidence to uphold the conviction. If so, it may hold that the entry of improper evidence at the trial level was harmless error. Newman v. United States, 156 F.2d 8 (9th Cir., 1946), cert. den. 329 U.S. 766; Stevens v. United States, 256 F.2d 619 (9th Cir., 1958).

CONCLUSION

For the reasons stated above, the judgment of conviction should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division

MICHAEL D. NASATIR
Assistant U. S. Attorney

Attorneys for Appellee,
United States of America

CONCLUSION

For the reasons stated above, the judgment of conviction should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division

MICHAEL D. NASATIR
Assistant U. S. Attorney

Attorneys for Appellee,
United States of America